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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 BINGHAM FOX,

13 Defendant.

NO. CR16-100RSL

ORDER DENYING U.S. MOTION  
TO PRECLUDE EXPERT  
TESTIMONY

14 This matter comes before the Court on the government's motion to preclude the testimony  
15 of defendant Bingham Fox's proposed expert John Douglas Dixon. Dkt. # 64. Defendant hopes  
16 to present Mr. Dixon's expert testimony about oil pollution compliance on fishing vessels  
17 similar to the one in this case. The government asks the Court to preclude that testimony on the  
18 grounds that defendant's Fed. R. Crim. P. 16(b)(1) expert disclosures were untimely and  
19 inadequate, that Mr. Dixon lacks the requisite expertise in the relevant field, and that defendant  
20 seeks to introduce Mr. Dixon's testimony as to an ultimate legal issue in the case. Having  
21 reviewed the memoranda and exhibits submitted by the parties,<sup>1</sup> the Court finds as follows.

22 Federal Rule of Criminal Procedure 16(b)(1) requires defendants to disclose certain  
23 information, including the results of any scientific test or experiment related to the trial  
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26 <sup>1</sup> The Court finds this matter suitable for disposition based on the materials submitted by the  
27 parties and therefore denies the parties' requests for oral argument.

1 testimony of a witness, Fed. R. Crim. P. 16(b)(1)(B), and a written summary of the basis for any  
2 expert witness opinion testimony, Fed. R. Crim. P. 16(b)(1)(C). The government argues that  
3 defendant's expert witness disclosure of October 11, 2016 was provided too close to the former  
4 trial date of October 31, 2016, and that in any event the written summary inadequately discloses  
5 the basis for Mr. Dixon's opinion testimony. Given the Court's continuance of defendant's trial  
6 until March 20, 2017, Dkt. # 73, the government's untimeliness argument is now moot. And the  
7 Court concludes that defendant's written summary adequately summarizes both the testimony  
8 that Mr. Dixon hopes to present and the basis for that testimony – namely, Mr. Dixon's forty-  
9 year career as an engineer focusing on shipboard safety and environmental issues. Dkt. # 64-1 at  
10 1, 4–5.

11 The government also argues that Mr. Dixon's proposed testimony is irrelevant and  
12 unreliable. To be admissible, expert testimony must be both relevant and reliable. Estate of  
13 Barabin v. AstenJohnson, Inc., 740 F.3d 457, 463–64 (9th Cir. 2014). "Relevance" requires only  
14 that the evidence "logically advance a material aspect of the party's case." Cooper v. Brown,  
15 510 F.3d 870, 942 (9th Cir. 2007). "Reliability" requires that the expert's testimony have "a  
16 reliable basis in the knowledge and experience of the relevant discipline." Kumho Tire Co., Ltd.  
17 v. Carmichael, 526 U.S. 137, 149 (1999) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc.,  
18 509 U.S. 579, 592 (1993)). It is the Court's responsibility to act as gatekeeper, excluding "junk  
19 science" that does not meet those standards. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982  
20 (9th Cir. 2011).

21 Defendant offers Mr. Dixon, a licensed marine engineer, for his expert testimony on  
22 common environmental practices aboard fishing vessels like defendant's. The government  
23 argues that Mr. Dixon should not be permitted to testify as to what environmental practices are  
24 permitted by federal law, or that it is common practice for fishing vessels to discharge oily water  
25 overboard in violation of that law. The Court agrees that an expert witness may not give his  
26 opinion on legal conclusions, such as what conduct federal law permits. See Hangarter v.

1 Provident Life & Acc. Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004). But testimony regarding the  
2 common environmental practices of fishing vessels may be both relevant and helpful to the fact-  
3 finder in understanding the complex technical facts of this case, see Fed. R. Evid. 702, and so  
4 Mr. Dixon may express his opinion on those practices without commenting on whether they  
5 comply with or violate federal law. The government may object to Mr. Dixon's testimony  
6 during trial and the Court will make its determination regarding the propriety of the testimony at  
7 that time.

8 The government also argues that Mr. Dixon's background does not qualify him to testify  
9 regarding the chemical and biological characteristics of oily bilge water and certain cleaning  
10 solvents. But Mr. Dixon need not be a chemist or biologist to develop an expert-level familiarity  
11 with characteristics of bilge water and cleaning solvents. The Court finds that Mr. Dixon's  
12 research on oil pollution compliance and his experience conducting environmental audits of  
13 fishing vessels qualifies him to testify on the basis of his familiarity with oily bilge water and  
14 bio-remedial cleaning solvents. This experience also qualifies Mr. Dixon to testify regarding  
15 whether, in his experience, fishing vessels pump oily bilge water overboard when the vessel  
16 holds contain live seafood. All of this testimony may well help the fact-finder understand  
17 technical aspects of this case. See Fed. R. Evid. 702. The government may test the basis for Mr.  
18 Dixon's opinions on cross-examination, and to the extent Mr. Dixon's testimony veers outside  
19 the scope of his experience, the government may object.

20 The Court is also unpersuaded by the government's argument that Mr. Dixon's testimony  
21 is unreliable because he never personally inspected defendant's vessel.<sup>2</sup> An expert witness is  
22 permitted wide latitude to offer opinions, including opinions not based on firsthand knowledge  
23 or observation, so long as the expert's opinion has a reliable basis in the knowledge and  
24 experience of his discipline. Jinro Am. Inc. v. Secure Investments, Inc., 266 F.3d 993, 1004 (9th  
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26 <sup>2</sup> Defendant argues that Mr. Dixon has, in fact, been aboard defendant's vessel on multiple  
27 occasions. Dkt. # 75 at 11.


1 Cir. 2001); Fed. R. Evid. 703. Upon review of Mr. Dixon's qualifications, Dkt. # 64-1 at 1-5,  
2 the Court concludes that Mr. Dixon's experience with marine safety and environmental practices  
3 is sufficiently reliable that total preclusion of his testimony is unwarranted. The government  
4 will have the opportunity to test Mr. Dixon's opinions on cross-examination.

5 The Court does, however, agree with the government that Mr. Dixon may not testify as to  
6 the state of mind of defendant and other crew members based on speculation regarding their  
7 interpretation of a Clean Water Act placard. Federal Rule of Evidence 704(b) explicitly  
8 provides that: "In a criminal case, an expert witness must not state an opinion about whether the  
9 defendant did nor did not have a mental state or condition that constitutes an element of the  
10 crime charged or of a defense. Those matters are for the trier of fact alone." The Court will not  
11 admit expert testimony stating an opinion on whether defendant possessed a culpable state of  
12 mind, but to avoid precluding relevant and admissible testimony, the Court will reserve ruling on  
13 the admissibility of specific expert testimony until it is presented in context.

#### 14 CONCLUSION

15 For the all the foregoing reasons, the government's motion to preclude the expert  
16 testimony of John Douglas Dixon (Dkt. # 64) is DENIED.

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18 DATED this 25th day of January, 2017.

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21 Robert S. Lasnik  
22 United States District Judge  
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